INDEX

	Page
Interest of the AFL-CIO	1
Argument	3
I. Peaceful Publicity Picketing Addressed Solely To Consumers, Requesting Them Individually And Voluntarily To Refrain From Purchasing A Nonunion Product At A Retail Outlet, Is Free Speech Protected By The Constitution	3
II. Congress Has Not Attempted To Prohibit Peaceful Publicity Picketing Addressed Solely To Consumers, Requesting Them Individually And Voluntarily To Refrain From Purchasing A Nonunion Product At A Retail Outlet	16
Conclusion	28

Citations

CASES:

AFL v. *Swing*, 312 U.S. 321	10, 12
Bakery Drivers Local 802 v. *Wohl*, 315 U.S. 769	10, 12, 13
Building Service Employers Local 262 v. *Gazzam*, 339 U.S. 532	8
Cafeteria Employees Local 302 v. *Angelos*, 320 U.S. 293	10, 12
Carpenters Local 213 v. *Ritter's Cafe*, 315 U.S. 722	5, 7, 9
Cox v. *Hart*, 260 U.S. 427	17
Dennis v. *United States*, 341 U.S. 494	5, 6
Fox v. *Washington*, 236 U.S. 273	7
Giboney v. *Empire Storage and Ice Co.*, 336 U.S. 490	6, 8
Gompers v. *Buck's Stove & Range Co.*, 221 U.S. 418	6
Hughes v. *Superior Court*, 32 Cal. 2d 850, 198 P. 2d. 885 (1948)	12
Hughes v. *Superior Court*, 339 U.S. 460	8, 11
IBEW Local 501 v. *NLRB*, 341 U.S. 694	9, 18
Milk Wagon Drivers Local 753 v. *Meadowmoor Dairies*, 312 U.S. 287	5, 15
NAACP v. *Webb's City, Inc.*, No. 362, this Term	4
NLRB v. *Denver Building & Construction Trades Council*, 341 U.S. 675	9, 10
NLRB v. *Servette*, No. 111, this Term	2
NLRB v. *Teamsters Local 639*, 362 U.S. 274	18
Plumbers Local 10 v. *Graham*, 345 U.S. 192	8
Schenck v. *United States*, 249 U.S. 47	4, 5

Page

Schneider v. *Irvington*, 308 U.S. 147 5
Teamsters Local 309 v. *Hanke*, 339 U.S. 470 9
Teamsters Local 695 v. *Vogt*, 354 U.S. 284 8
Teamsters Local 795 v. *Newell*, 356 U.S. 341, *revg. per curiam* 181 Kan. 898, 317 P. 2d 817 (1957) 10, 12
Thornhill v. *Alabama*, 310 U.S. 88 ..... 4, 8, 10, 12
Yates v. *United States*, 354 U.S. 298 6

STATUTES:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 542-43, 29 U.S.C. § 151 *et seq.*):
Section 8(b)(1)(A) 18
Section 8(b)(4)(i)(B) 2
Section 8(b)(4)(ii)(B) 2, 16, 17, 18
Section 8(b)(7) 16

CONGRESSIONAL:

105 Daily Cong. Rec. 1176 (Jan. 28, 1959), 2 Leg. Hist. 989 19
105 Daily Cong. Rec. 1304 (Jan. 29, 1959), 2 Leg. Hist. 1462 19
105 Daily Cong. Rec. 1568 (Feb. 4, 1959), 2 Leg. Hist. 994 19
105 Daily Cong. Rec. 5580 (Apr. 17, 1959), 2 Leg. Hist. 1037 25
105 Daily Cong. Rec. 5764 (Apr. 21, 1959), 2 Leg. Hist. 1079 19
105 Daily Cong. Rec. 13092 (July 27, 1959), 2 Leg. Hist. 1523 19
105 Daily Cong. Rec. 14195 (Aug. 11, 1959), 2 Leg. Hist. 1568 19
105 Daily Cong. Rec. 14207-08 (Aug. 11, 1959), 2 Leg. Hist. 1580-81 19
105 Daily Cong. Rec. 14209 (Aug. 11, 1959), 2 Leg. Hist. 1582 19
105 Daily Cong. Rec. 14339 (Aug. 12, 1959), 2 Leg. Hist. 1615 20
105 Daily Cong. Rec. 14517 (Aug. 13, 1959), 2 Leg. Hist. 1689 26
105 Daily Cong. Rec. 15222 (Aug. 20, 1959), 2 Leg. Hist. 1708 26
105 Daily Cong. Rec. 15900-01 (Aug. 28, 1959), 2 Leg. Hist. 1377-78 22
105 Daily Cong. Rec. 15906 (Aug. 28, 1959), 2 Leg. Hist. 1383 ..... 21, 22
105 Daily Cong. Rec. 16208 (Sept. 2, 1959), 2 Leg. Hist. 1386 22
105 Daily Cong. Rec. 16397 (Sept. 3, 1959), 2 Leg. Hist. 1426 26
105 Daily Cong. Rec. 16414 (Sept. 3, 1959), 2 Leg. Hist. 1432 23
105 Daily Cong. Rec. 16539 (Sept. 3, 1959), 2 Leg. Hist. 1712 25
105 Daily Cong. Rec. 16635 (Sept. 4, 1959), 2 Leg. Hist. 1720 25
105 Daily Cong. Rec. 17181 (Sept. 9, 1959), 2 Leg. Hist. 1454 25
105 Daily Cong. Rec. A3933 (May 11, 1959), 2 Leg. Hist. 1746 26
105 Daily Cong. Rec. A7855 (Sept. 8, 1959), 2 Leg. Hist. 1810 25
105 Daily Cong. Rec. A8262 (Sept. 14, 1959), 2 Leg. Hist. 1820 25

105 Daily Cong. Rec. A8523 (Oct. 2, 1959), 2 Leg. Hist. 1857 24
H. Conf. Rep. No. 1147, 86th Cong., 1st Sess. (1959) 19
H. Rep. No. 741, 86th Cong., 1st Sess. (1959) 19
H. R. 8400, 86th Cong., 1st Sess. 19
S. Doc. No. 10, 86th Cong., 1st Sess. (1959) 19
S. Rep. No. 187, 86th Cong., 1st Sess. (1959) 19

MISCELLANEOUS:

Cox, "Strikes, Picketing and the Constitution," 4 Vand. L. Rev. 574 (1951) 6, 8, 10, 11, 13
Dodd, "Picketing and Free Speech," 56 Harv. L. Rev. 513 (1943) 18
Fairweather, "An Evaluation of the Changes in Taft-Hartley," 54 Nw. U. L. Rev. 711 (1960) 2
Fisher, "Constitutional Questions Under the New Act," 48 Geo. L. J. 209 (1959) 2
E. A. Jones, "Picketing and Coercion," 39 Va. L. Rev. 1063 (1953) 18
E. A. Jones, "The Right to Picket—Twilight Zone of the Constitution," 102 Univ. Pa. L. Rev. 995 (1954) 6
F. E. Jones, "Free Speech: Pickets on the Grass, Alas!—Admidst Confusion, A Consistent Principle," 29 So. Calif. L. Rev. 137 (1956) 6, 9
Smith, "The Labor-Management Reporting and Disclosure Act of 1959," 46 Va. L. Rev. 195 (1960) 8
2 Sutherland, *Statutory Construction* (3d ed., 1943) 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO. 88

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

FRUIT & VEGETABLE PACKERS & WAREHOUSEMEN, LOCAL 760, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

INTEREST OF THE AFL-CIO

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

The AFL-CIO is a federation of national and international labor organizations having about thirteen million members. The right of American working people to advertise the existence of a labor dispute, and to seek the voluntary assistance of individual members of the consuming public, by the most effective means available, is of vital concern to the Federation and its affiliates. The AFL-CIO therefore wishes to submit to the Court its reasons for concluding that Congress has not prohibited, and constitution-

ally could not prohibit, peaceful picketing addressed solely to individual consumers, requesting them not to purchase the product of a nonunion firm at a retail outlet.[1]

Respondents will naturally concentrate on the applicability of the statute to the particular fact situation presented by this case. In our brief we will emphasize (1) the status of

[1] The AFL-CIO is equally interested in having sustained the position of the National Labor Relations Board in the companion case, *NLRB* v. *Servette*, No. 111, that (1) a request to a store manager not to continue doing business with a nonunion firm does not constitute an inducement of an "employed individual" to refuse "to perform any services," in violation of sec. 8(b)(4)(i)(B) of the National Labor Relations Act, and (2) a request to the consuming public at a retail outlet not to purchase products distributed by a nonunion wholesaler is protected by the proviso to sec. 8(b)(4), which expressly allows publicity that "a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer," even assuming *arguendo* there would otherwise be a violation.

The AFL-CIO has not attempted to intervene directly in *Servette*, because it believes most of the issues have been adequately covered by the NLRB brief and by the *amicus* brief filed by a union involved in a similar case. But we agree with the latter the Board has resorted too quickly to the 8(b)(4) proviso to save conduct which would not be "coercion" under 8(b)(4)(ii)(B) anyway.

We wish to emphasize, however, that apart from the statutory language and the legislative history, both of which confirm the NLRB's holdings in *Servette*, the gravest constitutional questions would be presented by any reading of the statute contrary to the Board decision in favor of the union. See, *e.g.*, Fairweather, "An Evaluation of the Changes in Taft-Hartley," 54 Nw.U.L. Rev. 711, 737 (1960) (a construction which would prevent a union from advertising its "dispute with a wholesaler or distributor" might be "highly questionable under the freedom of speech guarantees of the Constitution"); Fisher, "Constitutional Questions Under the New Act," 48 Geo. L.J. 209, 224 (1959) ("prohibitions on 'other publicity' do present substantial constitutional problems"). Everything said in this brief regarding the constitutional right to engage in pure consumer picketing will of course apply at least as strongly to nonpicketing appeals to individual employers, or their immediate managerial representatives, and to individual consumers, for their voluntary assistance in a labor dispute.

picketing by unions or by any other groups as a mode of free speech, entitled to constitutional protections against legislative restrictions or prohibitions, and (2) the legislative history of the 1959 amendments to the Taft-Hartley Act, which establishes that picketing directed solely against a product of a nonunion producer was wholly outside the area of conduct forbidden by Congress. We feel our presentation will enable the Court to appreciate more fully the wide-ranging implications of this case regarding the legality of picketing by many kinds of minority or protest groups, and will enable the Court to avoid any hurtful constitutional pronouncements by a plain, straight-forward reading of the statute, holding it inapplicable to the type of consumer picketing at issue here.

ARGUMENT

I. Peaceful Publicity Picketing Addressed Solely To Consumers, Requesting Them Individually And Voluntarily To Refrain From Purchasing A Nonunion Product At A Retail Outlet, Is Free Speech Protected By The Constitution.

If a constitutional question must be reached in this case, that question will be whether the two quiet and dignified union women whose picture appears as Exhibit No. 9 to the Stipulation of Facts in this case (R. 33) were exercising their constitutionally protected freedom of expression, rather than "coercing" someone, when they "walked back and forth on the sidewalks in front of the main customer entrances" at a supermarket, "wearing cardboard placards" which informed individual consumers a nonunion product was being sold at the store and requested them not to purchase that particular product (R. 38, 25).

Inseparably linked to this question is the question of whether the constitutional right of free speech applies to

peaceful picketing by Negroes protesting racial discrimination in public accommodations or employment,[2] by religious or patriotic groups protesting supposedly objectionable motion pictures, or by any other popular or unpopular groups attempting to present to the public in the most effective way possible their view of a controversial issue, and soliciting the voluntary assistance of the individual consumer through his withdrawal of patronage from the offending firm or product.

Recognition of one simple principle will cut away all the confusion which has grown up around the constitutional status of picketing; will place every decision by this Court on the subject since *Thornhill* v. *Alabama*, 310 U.S. 88, in a coherent and consistent pattern; and will provide an analytical guide whereby attention may be directed to the genuine constitutional issues involved whenever peaceful picketing is restricted or prohibited.

As a means of communication, picketing is free speech and is entitled to every constitutional protection afforded any other form of expression. The test in *Thornhill*, 310 U.S. at 104-05, that an abridgment of the right to publicize through peaceful picketing or similar activity "can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion," precisely parallels the general rule governing all forms of expression, laid down by Justice Holmes on behalf of this Court in *Schenck* v. *United States*,

[2] This of course is not a hypothetical situation. For example, in *NAACP* v. *Webb's City, Inc.*, No. 362, this Term, there is directly posed the issue of whether picketing by a Negro organization protesting the refusal by a Florida drug store to serve Negro customers in its cafeteria is protected by the First and Fourteenth Amendments' free speech guarantees. A Florida court found such picketing was not protected as an exercise of free speech.

249 U.S. 47, 52: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Cf. Dennis* v. *United States*, 341 U.S. 494, 510 (quoting with approval Judge Learned Hand's inquiry "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger"). Properly understood, not a single holding of this Court regarding the status of picketing in a case subsequent to *Thornhill* departs one iota from the test enunciated in that decision.[3]

Put most simply, as has been stated by Professor Francis E. Jones, Jr., of Southern California Law School: "Picketing, like any other speech, is protected by the Constitution—as a *means;* however, like other speech, it will not be protected when used for the purpose of accomplishing

---

[3] We naturally do not concede that every picketing case was rightly decided. In several instances the Court viewed the factual situation differently from the way we would have viewed it. But this does not affect our contention that, assuming *arguendo* the correctness of the Court's interpretation of the facts and of its evaluation of the object of the picketing, there has been undeviating decisional consistency on the status of picketing as such.

As a form of physical activity, picketing may also be subject to trespass laws, to reasonable regulations covering the use of public streets, and so on. See *Schneider* v. *Irvington*, 308 U.S. 147, 160; *Carpenters Local 213* v. *Ritter's Cafe*, 315 U.S. 722, 731 (Black, J., dissenting), and cases cited. The same would be true of any assemblage of persons to listen to a public speech, or to engage in a protest march or other popular demonstration. Furthermore, violent picketing, or picketing (like other utterance) "in a context of violence," has been held subject to prohibition. *Milk Wagon Drivers Local 753* v. *Meadowmoor Dairies*, 312 U.S. 287, 293. There is no suggestion that any of these elements were present in the peaceful and orderly picketing in the instant case (R. 38-39).

an unlawful *end*."[4] We suggest that the soundness of this analysis is readily verified by inquiring whether any case in which a ban on peaceful picketing was upheld would have been decided differently had the ban applied to an oral or written communication, at the same time and place, of the message conveyed by the pickets.[5]

The pivotal decision is *Giboney* v. *Empire Storage and Ice Co.*, 336 U.S. 490. There this Court, in a unanimous opinion, upheld a state court injunction against peaceful picketing aimed at inducing wholesale distributors to agree with a union not to sell ice to nonunion peddlers, in violation of a state statute forbidding combinations in restraint of trade. The validity of the state antitrust legislation being recognized, it was an easy step to conclude that "placards used as an essential and inseparable part of a grave offense against an important public law cannot immunize

[4] F. E. Jones, "Free Speech: Pickets on the Grass, Alas!—Amidst Confusion, A Consistent Principle," 29 So. Calif. L. Rev. 137, 157 (1956). (Emphasis in the original.) See also E. A. Jones, "The Right to Picket—Twilight Zone of the Constitution," 102 Univ. Pa. L. Rev. 995, 1028 (1954).

[5] In certain situations picketing might constitute a "clear and present danger" that a "substantive evil" will be accomplished, while an oral or written communication delivered far from the scene or phrased in abstract terms might not. But that is a function of the time and place and specificity of the message conveyed by the picketing (including any special signification attached to it by prearrangement among some particular group), and not something inherent in the nature of the conduct itself. Any other kind of speech or advocacy likewise may or may not represent a clear and present danger which can be declared unlawful, depending on its tendency to generate concrete action. Compare *Dennis* v. *United States*, 341 U.S. 494, with *Yates* v. *United States*, 354 U.S. 298.

On the status of an unfair list used to "signal" a boycott by unionized employees acting in concert, see *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 439. *Cf.* Cox, "Strikes, Picketing and the Constitution," 4 Vand. L. Rev. 574, 601 (1951) ("the Court cannot long distinguish between the picket line and the unfair list").

that unlawful conduct from state control." *Id.* at 502. The gang leader's oral remarks to his henchmen may be speech in the truest sense, but if they are in furtherance of a conspiracy to rob a bank, they are not immune from the regulatory power of government. See, *e.g.*, *Fox* v. *Washington*, 236 U.S. 273, 277.

The critical factor is the end pursued, not the means used. If that end is unlawful, picketing, or any other form of expression in direct furtherance of it, can be restricted. If that end is lawful, and cannot constitutionally be declared unlawful, picketing, like any other form of expression in furtherance of it, cannot constitutionally be forbidden.[6]

In several of the cases where a ban on peaceful picketing has been upheld, the "unlawful end" or "substantive evil" proscribed by governmental authority was the "exertion of *concerted* pressure" by employees, typically acting subject to union sanctions or loyalties, to compel a person to do an act which a constitutionally permissible public policy had declared should be left to his free choice. See *Carpenters Local 213* v. *Ritter's Cafe*, 315 U.S. 722, 726. (Emphasis supplied.) In certain cases the act which the union wanted someone to do was itself unlawful, as in *Giboney;* in these instances even a direct, uncoercive inducement of the act could have been probibited. But where the act sought was lawful, the most this Court has ever held was that a person could constitutionally be insulated, in furtherance of a valid public policy, from the coercion brought to bear directly by a *combination* of employees, ordinarily acting pursuant to organizational rules and discipline. The Court has never held or suggested that it would be constitutional to prohibit anyone from advising individual mem-

[6] This assumes, naturally, that the picketing is peaceful and orderly.

bers of the consuming public that an employer (or his employees) had refused or failed to do some lawful act, and requesting those individual consumers voluntarily to refrain from patronizing that employer or his product.[7]

In addition to *Giboney*, where the wholesale ice distributors would have violated the Texas antitrust law by acceding to the union's demands, other cases in which picketing bans were upheld where, as the Court viewed the facts, even voluntary compliance with the union's desires would have been unlawful, include *Building Service Employees Local 262* v. *Gazzam*, 339 U.S. 532 (picketing to have employer force his employees to join a union, contrary to state statute forbidding such employer coercion); *Plumbers Local 10* v. *Graham*, 345 U.S. 192 (picketing to have employer require union membership as a condition of employment, in violation of state right-to-work law); *Teamsters Local 695* v. *Vogt*, 354 U.S. 284 (picketing to have employer force his employees to join a union). *Cf. Hughes* v. *Superior Court*, 339 U.S. 460 (picketing to have employer practice racial discrimination in hiring, contrary to state policy).[8]

---

[7] See, *e.g.*, Smith, "The Labor-Management Reporting and Disclosure Act of 1959," 46 Va. L. Rev. 195, 242 (1960) ("[t]he line of Supreme Court decisions limiting *Thornhill v. Alabama* has not included any case going this far," *i.e.*, upholding a ban on "peaceful secondary picketing • • • directed toward • • • the withholding of customer patronage from the secondary employer when undertaken for a legally permissible object").

[8] Sound as it is as an abstract proposition, the "unlawful purpose" doctrine can create a serious threat to First Amendment rights in actual practice, as members of this Court and academic observers have been quick to point out. See, *e.g.*, Douglas, J., dissenting in *Teamsters Local 695* v. *Vogt*, 354 U.S. 284, 296 ("state court's characterization of the picketers' 'purpose' had been made well-nigh conclusive"); Cox, *supra* note 5, 4 Vand. L. Rev. at 598-99, n. 97 (1951) ("[w]hat does give cause for great concern is the Court's astuteness in finding for recent injunctions some basis in a

Cases where the person who was the target of the picketing could lawfully have done the act requested, but where valid state policy decreed his decision should not be coerced by the concerted pressures of organized employees, are represented by *Teamsters Local 309* v. *Hanke*, 339 U.S. 470 (picketing to enlist union deliverymen and union patrons to force self-employer to abide by union working conditions), and the "secondary boycott" cases, *Carpenters Local 213* v. *Ritter's Cafe*, 315 U.S. 722; *NLRB* v. *Denver Building and Construction Trades Council*, 341 U.S. 675; and *IBEW Local 501* v. *NLRB*, 341 U.S. 694. In each of the last three cases a labor organization used picketing either as "a signal in the nature of an order to the members of the affiliated unions," 341 U.S. at 678, or as a "bare instigation," 341 U.S. at 701, 704, that organized employees leave their jobs or refuse to make deliveries, in order to force a supposed "neutral" to cease doing business with the primary employer.[9] We do not necessarily agree with the conclusions reached in all these decisions, but for the purposes of the instant case we need not quarrel with them. The crucial factor in every instance was that someone had a special interest of sufficient value (his status as an independent self-employer, or his status as a putative "neutral") that this Court felt the state could, consistent with the Constitution, protect him against being forced to relinquish it by a combination of employees responding to group discipline.

On the other hand, whenever this Court has dealt with peaceful picketing whose end was the doing of a lawful act by the target of the picketing, uncoerced by organized em-

---

supposed state policy which will furnish a constitutional foundation"); F. E. Jones, *supra* note 4, 29 So. Calif. L. Rev. at 162.

[9] The rationales of "signal picketing" and "secondary boycott" were not expressly utilized in *Ritter's Cafe*, but they fit the facts as seen through the eyes of the Court.

ployees or a group acting in concert, the Court has consistently sustained the constitutional right of the picketers "to advise customers and prospective customers • • • and thereby to induce such customers not to patronize." *Thornhill* v. *Alabama*, 310 U.S. 88, 99; *AFL* v. *Swing*, 312 U.S. 321; *Bakery Drivers Local 802* v. *Wohl*, 315 U.S. 769; *Cafeteria Employees Local 302* v. *Angelos*, 320 U.S. 293; *Teamsters Local 795* v. *Newell*, 356 U.S. 341, *revg. per curiam* 181 Kan. 898, 317 P. 2d 815 (1957).

This distinction makes for a rational and practicable demarcation line. If picketing is used to instigate mass action by organized employees to make someone do a certain act, there may be occasions when society can constitutionally prohibit the mass action and the picketing or other "signal" used to set it in motion, see *NLRB* v. *Denver Building and Construction Trades Council*, 341 U.S. 675, 678, even though the act sought is lawful in itself, and direct, uncoercive solicitation of it would be constitutionally protected free speech. But if the picketing is used simply to publicize the facts of a labor dispute and to request the voluntary support of individual consumers, acting wholly on their own without the pressure of group discipline, then such picketing is free speech as much as any other form of expression, and cannot constitutionally be forbidden, as long as the act which the picketing seeks to bring about is itself a lawful one.

Former Professor Archibald Cox has been a leading academic proponent of the view that "the constitutional decisions in picketing cases should depend, in part, on whether the 'publicity' or 'signal' aspect predominates."[10] He points out that in the "signal" situation, the picket's reliance "is on the sanctions inherent in the discipline and organized economic power of his union. Quite different is

[10] Cox, *supra* note 5, 4 Vand. L. Rev. at 595.

the peaceful picketing which is directed primarily to the general public. * * * the success or failure of pickets' appeal depends primarily upon the persuasiveness of their message."[11] Professor Cox concludes:

> "The critical inquiry is whether the employees' conduct involves an appeal to an uncoerced audience each individual in which is left free to choose his own course of conduct or invokes the power of an organized combination. * * * the worker and his union who are seeking an objective which is not itself inconsonant with the policy of the State, should be free to appeal to others for their voluntary, individual assistance."[12]

What has been said answers the Labor Board's arguments for the constitutionality of outlawing the type of picketing at issue in the present case. In essence those arguments are (1) consumer picketing, in addition to so-called "signal" picketing addressed to employees, may constitutionally be prohibited, as is shown by *Hughes* v. *Superior Court*, 339 U.S. 460 (NLRB Brief, pp. 32-34); and (2) Congress has decided that "the secondary boycott" is a "substantive evil," and this judgment "is enough, without more, to warrant a ban on picketing which seeks to achieve a secondary boycott" (NLRB Brief, p. 35). Such arguments are grounded on wholly misleading oversimplifications.

In *Hughes* this Court was faced with a state court injunction against picketing by Negroes at a retail store, about 50 per cent of whose customers were Negroes, demanding the employment of Negro clerks in proportion to the number of Negro patrons. The California Supreme Court had expressly declared: "The *controlling issue* is whether the sole objective involved—the discriminatory hir-

[11] *Id.* at 594.

[12] *Id.* at 602.

ing of a fixed proportion of Negro employees regardless of all other considerations—is lawful." 32 Cal. 2d 850, 852, 198 P. 2d 885 (1948). (Emphasis supplied.) After a careful consideration of state policy on the subject, the California court concluded that this type of discrimination would be the equivalent of the previously condemned "closed shop and a closed union," this time in favor of the Negro race, and so the picketing was for a "specific unlawful purpose." 32 Cal. 2d at 856. This Court affirmed California's judgment sustaining the injunction.

Justice Frankfurter, for the Court, expressly observed that picketing is subject to state control if "the purpose which it seeks to effectuate gives ground for its disallowance." 339 U.S. at 465-66. With that proposition he placed the case squarely within the rationale of *Giboney*, and, in light of the state court's declaration of policy against racial discrimination in hiring, nothing more had to be said. Indeed, Justices Black, Minton, and Reed concurred solely on the basis that *Giboney* controlled. (Justice Douglas did not participate.) The employer was being asked to do an act which was itself opposed to public policy, and any means constituting a clear and present danger of effectuating that evil, whether denominated publicity picketing or signal picketing or oral communication, would have been subject to state prohibition.[13]

Furthermore, unlike the pure publicity picketing upheld against state attack in *Thornhill*, *Swing*, *Wohl*, *Angelos*, and in the last significant picketing decision, *Newell*, the picketing in *Hughes* may, in a rather strained sense, be re-

[13] Justice Frankfurter seems to have thought that California may not have forbidden the employer "to adopt such a quota system of his own free will." 339 U.S. at 468. This is a dubious point, and certainly was not directly raised. At any rate racially proportionate hiring was plainly declared to be contrary to state policy, which is equivalent to saying it was unlawful, at least for certain purposes.

garded as having some of the "signal" aspects which apparently concerned Justice Frankfurter in a number of his opinions. The picketing in *Hughes* was carried on by Negroes, sought increased employment opportunities for Negroes, and was aimed at an audience composed of "about 50%" Negroes. In view of the possible social pressures and group loyalties present, it might almost be said the situation was not vastly different from one involving unionized employees on a job. But to suggest this as a conceivable distinction is to suggest how disquieting it is to find the Government, in the year 1963, apparently relying on a case like *Hughes* as its leading authority for the proposition that picketing as such, even in the context of a consumer appeal, is not the equivalent of speech (NLRB Brief, pp. 32-34). We can agree totally with the abstract proposition that picketing, like any other form of communication, can be interdicted when directed toward an unlawful end. That is how *Hughes* can and should be distinguished. Viewed solely as a means, however, picketing is simply the most effective mode of expression available to minority and protest groups, and we should have thought the Government would have been more solicitous to see that its usefulness remains unimpaired and that it is not relegated to the status of second-class speech.[14] *Cf.* Douglas, J., concurring in *Bakery Drivers Local 802* v. *Wohl*, 315 U.S. 769, 775, who queried whether "a State can prohibit picketing when it is effective but may not prohibit it when it is ineffective."

The picketing in the instant case was aimed at individual

[14] Surely Professor Cox was on firmer ground when he said regarding some of Justice Frankfurter's language in *Hughes*: "One wonders whether the opinion does not mistake for peculiar attributes of picketing characteristics which are common to all appeals for assistance in industrial controversies." Cox, *supra* note 5, 4 Vand. L. Rev. at 600.

members of the general public, composed, presumably, of the usual heterogeneous assortment who frequent an American supermarket. Their response to the pickets would depend on their personal predilections and the persuasiveness of the message presented. Group pressures or organizational sanctions would play no part in their decision. The key question, then, as counsel for the Labor Board seem to recognize, is whether the picketing was in furtherance of an "illegal objective" or a "substantive evil" which Congress has the constitutional power to prohibit (NLRB Brief, pp. 34-35).

For Labor Board counsel, the "substantive evil" is the "secondary boycott." As applied to the facts of this case, we do not know exactly what that means, and no further explication is provided. The union was seeking to persuade retail customers, individually and voluntarily, not to purchase the primary employer's product.[15] If this persuasion was successful, the retailer might drop the primary employer's product as a poor seller. To us this sounds more like "primary" than "secondary" activity. But however that may be, surely both the individual customer's decision not to buy, and the retailer's decision not to continue stocking an unpopular brand, are lawful acts beyond the constitutional power of Congress to prohibit. Since Congress cannot prohibit these ends, it cannot prohibit speech or peaceful publicity picketing used as the means to achieve them.[16]

[15] The NLRB does not question the simultaneous handbilling to accomplish the selfsame end (R. 38, 41).

[16] Even if the union had tried to persuade individual customers to stop patronizing the retailer altogether, in order to get him to stop handling the primary employer's product, the decisions of this Court would not justify forbidding the picketing. Each individual refusal to patronize would be a lawful act; the retailer's cessation of business with the primary employer would be a lawful act; and the retailer's decision, although it might be said to have been forced by the cumulative effect of individual, voluntary acts, was not co-

If the "substantive evil" should be described bluntly as the publicizing of a labor dispute anywhere except at the primary employer's premises, on the ground this might "unduly enlarge the area of labor disputes and disrupt the free flow of commerce" (see NLRB Brief, p. 35), that would merely serve to throw into bold relief the ramifications of the constitutional rights here at stake. Even commercial advertising and the reports of consumer research groups could be said to enlarge the area of intercompany disputes and to disrupt the free flow of commerce in competitive or poorly rated products. The position of the retailer selling such products would be essentially the same as that of the supermarket carrying Tree Fruits' apples. Yet the advertisers' and consumer groups' communications seem plainly protected. "Peaceful picketing," this Court has said, "is the workingman's means of communication." *Milk Wagon Drivers Local 753* v. *Meadowmoor Dairies*, 312 U.S. 287, 293. When that picketing is stripped of every element except a pure appeal to individual members of the general public to do a voluntary and lawful act, and forms no part of a scheme to cause anyone to do an unlawful act, it does not lose the character of free speech just because the message is communicated at the place where it is most likely to be effective.

A glance at the photograph of some of the picketing in this case (R. 33) will demonstrate better than any words why it is so essential that the workingman's message be communicated in this particular manner. Amidst the riot of advertising signs emblazoned across this typical store front, only placards carried to the scene can be expected to compete for the hurrying shopper's attention. If free speech

---

erced by the concerted pressure of an organized group. See note 7, *supra*. But this question of course is not presented on the facts of the instant case.

is to mean efficacious speech, for every group in our society, such peaceful publicity picketing cannot constitutionally be prohibited.

II. Congress Has Not Attempted To Prohibit Peaceful Publicity Picketing Addressed Solely To Consumers, Requesting Them Individually And Voluntarily To Refrain From Purchasing A Nonunion Product At A Retail Outlet.

There is no need to reach a constitutional question in this case. Neither the statutory language nor the legislative history warrants the sweeping (but utterly crucial) conclusion of Labor Board counsel that the "*mere existence* of a consumer picket line at a neutral employer's premises carries a threat of business loss which would exert pressure on him to cease business relations with the primary employer," and therefore "can reasonably be viewed as 'threatening, restraining, or coercing' the neutral employe irrespective of whether it in fact caused him any economic loss" (NLRB Brief, p. 13; emphasis supplied).[17]

The statute itself says nothing about forbidding "consumer picketing," although Congress knew how to outlaw picketing, precisely and explicitly, when it so chose, as in section 8(b)(7) of the Act. Instead, section 8(b)(4)(ii)(B), at issue here, forbids a union to "threaten, coerce, or restrain" any person where an object is "forcing or requiring" him to "cease doing business with any other person." This general prohibition is subject to an express proviso allowing "publicity, other than picketing," to advise the public that one employer is distributing another employer's nonunion products.

A straight-forward reading of this provision was supplied by the unanimous Court of Appeals below, holding "that

[17] Counsel have not exaggerated the position of the NLRB itself, which is reflected by the flat statement that "consumer picketing in front of a secondary establishment is prohibited" (R. 41).

§ 8(b)(4)(ii) outlaws only such conduct (including picketing) as in fact threatens, coerces or restrains secondary employers, and that the proviso is intended to exempt from regulation 'publicity other than picketing' even though it threatens, coerces or restrains an employer" (R. 61). Such an interpretation pays proper heed to a familiar principle of statutory construction: "The office of a proviso is well understood. It is to except something from the operative effect, or to qualify or restrain the generality, of the substantive enactment to which it is attached." *Cox* v. *Hart*, 260 U.S. 427, 435. See also 2 Sutherland, *Statutory Construction*, § 4932, p. 469 (3d ed., 1943). Thus the critical inquiry is whether the consumer picketing in question falls within the general prohibition of the section as a threat, coercion, or restraint, not whether it falls within the excepting language of the proviso.

The Court of Appeals has thoroughly dealt with the particular circumstances of this case, emphasizing there was "no evidence concerning the impact of the picketing on Safeway's sales or its relations with the struck firms," noting that "Tree Fruits, not Safeway, is the charging party," and concluding that it had not been shown that the "picketing—directed against only one of hundreds of products sold by Safeway—caused or was likely to cause substantial economic injury" (R. 60, 63, 66). In short, evidence was lacking on the issue "whether Safeway was *in fact* threatened, coerced, or restrained" (R. 66; emphasis supplied). All this is true, and alone is enough to dispose of the present case, once there is demonstrated the error of the Board's contention that the statute makes unlawful *per se* all consumer picketing at a secondary employer's premises. But as *amicus* counsel we wish to go one step further and demonstrate, in addition, that the very *kind* of consumer picketing involved here, aimed at getting individ-

ual customers not to purchase a primary employer's product rather than not to patronize the secondary retailer, was beyond any prohibitory intent of Congress.

The words "restrain or coerce" constitute a " 'restricted phrase' to be equated with 'threat of reprisal or force or promise of benefit.' " *NLRB* v. *Teamsters Local 639*, 362 U.S. 274, 284, quoting from *IBEW Local 501* v. *NLRB*, 341 U.S. 694, 701-703. In *Teamsters Local 639* this Court pointed out that "[i]n the sensitive area of peaceful picketing Congress has dealt explicitly with isolated evils which experience has established flow from such picketing," and demanded the "clearest indication in the legislative history" that recognition picketing by a minority union was conduct to "restrain or coerce" employees in violation of section 8(b)(1)(A). 362 U.S. at 284. Finding only "isolated references" in the debates to suggest such a broad interpretation of the phrase, the Court rejected it. *Id.* at 286, 290. Since picketing by a minority union to get an employer to recognize the union as his employees' exclusive bargaining agent does not "coerce" the employees, picketing to persuade customers not to buy one particular product can hardly be said to "coerce" a retailer.[18]

Congress inserted part (ii) into section 8(b)(4) in 1959 in response to numerous assertions that there was a "loophole" in the existing law. While the Taft-Hartley Act forbade actual union inducements of secondary employees to

---

[18] *Cf.* E. A. Jones, "Picketing and Coercion," 39 Va. L. Rev. 1063, 1065 (1953): "In the quoted passage from the *Senn* case Mr. Justice Brandeis takes in the causal sequence of peacefully conducted successful picketing—peaceful picketer to concurring viewer to affected concern. He recognizes that the societal pressure which has finished Senn as an entrepreneur is typical in our competitive society, that it is a result of publicity which persuades. There was no unlawful purpose involved; *there has been no coercion* • • •." (Emphasis supplied.) See also Dodd, "Picketing and Free Speech," 56 Harv. L. Rev. 513, 518, i. 11 (1943).

strike, the advocates of further restrictions complained it did not reach the "direct coercion" of secondary employers, or "threats" of secondary "strikes" or "labor troubles."[19] The phrase "threaten, coerce, or restrain" was intended to plug this loophole. But nowhere in the Senate Report or the House Report, or in the Conference Report's explanation of the publicity proviso which was added in conference to the House bill's general prohibition of coercion, is there the slightest indication that Congress intended to outlaw all consumer picketing at secondary premises. See S. Rep. No. 187, 86th Cong., 1st Sess. (1959); H. Rep. No. 741, 86th Cong., 1st Sess. (1959); H. Conf. Rep. No. 1147, 86th Cong., 1st Sess., p. 38 (1959).

That all such consumer picketing was not banned even by the original Landrum-Griffin bill, H.R. 8400, 86th Cong., 1st Sess., as passed by the House, is established by the very colloquy between Representatives Brown and Griffin which Labor Board counsel spread across three pages of their brief, in the evident belief that it furnishes a major prop for their argument (NLRB Brief, pp. 21-23). The key portions of this exchange are as follows:

"Mr. BROWN of Ohio. • • •

My question concerns the picketing of customer entrances

[19] See, *e.g.*, President's Message, S. Doc. No. 10, 86th Cong., 1st Sess., p. 3 (1959); S. Rep. No. 187, 86th Cong., 1st Sess., p. 79 (1959) (Minority Views); 105 Daily Cong. Rec. 1176 (Jan. 28, 1959), 2 Leg. Hist. 989 (Sen. Curtis); 105 Daily Cong. Rec. 1568 (Feb. 4, 1959), 2 Leg. Hist. 994 (Secretary of Labor Mitchell); 105 Daily Cong. Rec. 5764 (Apr. 21, 1959), 2 Leg. Hist. 1079 (Sen. Goldwater); 105 Daily Cong. Rec. 1304 (Jan. 29, 1959), 2 Leg. Hist. 1462 (Rep. Bosch); 105 Daily Cong. Rec. 13092 (July 27, 1959), 2 Leg. Hist. 1523 (Reps. Landrum and Griffin); 105 Daily Cong. Rec. 14195 (Aug. 11, 1959), 2 Leg. Hist. 1568 (Rep. Griffin); 105 Daily Cong. Rec. 14207-08 (Aug. 11, 1959), 2 Leg. Hist. 1580-81 (Rep. Rhodes); 105 Daily Cong. Rec. 14209 (Aug. 11, 1959, 2 Leg. Hist. 1582 (Rep. Dixon).

to retail stores selling goods manufactured by a concern under strike. Would that situation be prohibited under the gentleman's bill?

Mr. GRIFFIN [after discussing existing prohibitions]. However, if the picketing happened to be around at the customer entrance, *and if the purpose of the picketing were to coerce the employer* not to handle those goods, then under present law, because of technical interpretations, the boycott would not be covered.

Mr. BROWN of Ohio. In other words, the Taft-Hartley Act does not cover such a situation now?

Mr. GRIFFIN. The way it has been interpreted.

Mr. BROWN of Ohio. But the Griffin-Landrum bill would?

Mr. GRIFFIN. Our bill would; that is right. *If the purpose of the picketing is to coerce or restrain the employer of that second establishment,* to get him not to do business with the manufacturer—*then* such a boycott could be stopped.

Mr. BROWN of Ohio. • • • Would that same rule apply to the picketing at the customer entrances, for instance, of plumbing shops, or newspapers that might run the advertising of these concerns, or radio stations that might carry their program?

Mr. GRIFFIN. Of course, this bill and any other bill *is limited by the constitutional right of free speech. If the purpose of the picketing is to coerce the retailer* not to do business with the manufacturer, whether it is plumbing—• • • [a]dvertising, or anything else, it would be covered by our bill." 105 Daily Cong. Rec. 14339 (Aug. 12, 1959), 2 Leg. Hist. 1615. (Emphasis supplied.)

In short, Representative Griffin, co-sponsor of the bill,

was three times offered the chance to say, unconditionally, that all secondary consumer picketing was outlawed by his proposal—and he three times turned that chance aside. Only "*if*" the picketing were aimed at "coercing" the secondary employer would it be proscribed.

Nothing more should have to be added to vindicate the union in the instant case and to confirm the soundness of the court's reasoning below. Representative Griffin's remarks represent the sole explicit commentary by a supporter of his bill on its applicability to secondary consumer picketing, prior to the bill's passage by the House. And the essence of his remarks is that such picketing is not *per se* unlawful; it is only unlawful when it is coercive in actuality, or at least when it has the purpose of being coercive in actuality. Such coercion might exist if the picketing were intended to cut off the secondary employer's deliveries, or his customers generally, especially if the picketing enlisted the support of organized employees. But in the absence of any shred of evidence supporting a finding of such actual or potential coercion, apart from the NLRB's *per se* doctrine that all consumer picketing at a secondary site is coercive, the Board's case in the present instance collapses.

It only remains for us to show that Congress never intended to outlaw peaceful publicity picketing asking customers not to buy nonunion goods, as distinguished from picketing asking customers not to patronize secondary establishments handling such goods. On this point the conference proceedings are the most enlightening.

The Senate conferees sought to whittle down the prohibitions of the Landrum-Griffin bill, even as applied to the "coercion" of secondary employers. To this end they proposed a proviso which would have excepted from regulation all "publicity for the purpose of truthfully advising the public." 105 Daily Cong. Rec. 15906 (Aug. 28, 1959), 2 Leg.

Hist. 1383. Ultimately, however, the Senators were forced to settle for the present proviso, which excepts only "publicity, other than picketing." The net effect was to retain the House bill's ban against "coercive" picketing, regardless of whether it is "publicity." But this still leaves untouched all picketing *not* coercive of a secondary employer.

Although the floor debates focused primarily on the way the proviso would cut back the House prohibition, they also indicated what was regarded as being coercive. Senator Kennedy reported, while the conference was in progress, that "[w]orkers would not be denied under the substitute the traditional right to ask the public *not to patronize one who sells* nonunion goods or goods of a manufacturer engaged in a labor dispute," but that the Senate conferees had "receded on the question of consumer picketing *of a secondary employer*." 105 Daily Cong. Rec. 15900-01 (Aug. 28, 1959), 2 Leg. Hist. 1377-78. (Emphasis supplied.) Senator Goldwater, finding "a general misunderstanding of many of these terms," defined a "secondary consumer, or customer, boycott" as "the refusal of consumers or customers *to buy the products or services of one employer* in order to force him to stop doing business with another employer." 105 Daily Cong. Rec. 16208 (Sept. 2, 1963), 2 Leg. Hist. 1386. (Emphasis supplied.)

Accordingly, when the conferees agreed to the proviso excepting "publicity, other than picketing" from the House bill's ban on coercion, it is fair to conclude they were only concerned with publicity and picketing "to ask the public *not to patronize one who sells* nonunion goods." It would be a remarkable twist if the *proviso* should somehow be construed as importing into the Act a substantive prohibition against picketing aimed only at primary products and not at secondary distributors, which is totally different from

the kind of secondary picketing over which the proviso battle raged.[20] This is especially true in light of Representative Griffin's insistence that his bill dealt only with picketing "to coerce the retailer," in the first place.

Against this background, an exchange between Senators Kennedy and Goldwater, during the Senate's consideration of the Conference Report, becomes readily understandable. In a passage where he was "[e]xplaining the *proviso*" (see NLRB Brief, p. 24; emphasis supplied), Senator Kennedy described one of the employee rights insisted upon by the Senate conferees: "(c) The right to appeal to consumers by methods other than picketing asking them to refrain from buying goods made by nonunion labor *and to refrain from trading with a retailer who sells such goods.*" 105 Daily Cong. Rec. 16414 (Sept. 3, 1959), 2 Leg. Hist. 1432. (Emphasis supplied.) It was only in this context that Senator Kennedy said the Senate conferees "were not able to persuade the House conferees to permit picketing in front of that secondary shop." *Ibid.* Any suggestion that all picketing to influence customers' decisions on purchasing certain products necessarily "coerces" the retailer was immediately dispelled by Senator Goldwater, who broke in to ask "whether there is anything in the conference report

---

[20] Significantly, the proviso expressly permits nonpicketing publicity addressed to "the public, including consumers *and members of a labor organization.*" (Emphasis supplied.) This may suggest that it was the frequent use of picketing as a "signal" for concerted action, when directed to a union's members, which prompted the conference to distinguish between picketing and other forms of publicity. The statutory structure thus reinforces the view that picketing *not* addressed to the "members of a labor organization," but only to "consumers" and the public generally, was not within the scope of the prohibition. Indeed, from the face of the statute it could be concluded that no pure publicity picketing was forbidden, regardless of whether customers were asked not to purchase the primary product, or not to patronize the secondary retailer.

which would limit or prohibit the buy-America campaigns which are being carried on by certain unions and business groups." *Ibid.* Senator Kennedy replied: "I know that a good deal of effort has been made by some groups of workers, such as those who work on hats, *to make sure that their working standards are protected.* The answer to the Senator's question is no, it was not intended that the conference report have such an effect." *Ibid.* (Emphasis supplied.)

Senator Goldwater, also a Senate conferee and one of the most avid proponents of stiff boycott curbs, later provided an extensive analysis of the new Act. In discussing the amended section 8(b)(4), he pointed out that "under previous law a labor union having a dispute with the producer, company A, could lawfully picket the distributor, company B, who carried company A's products for sale, for the purpose of inducing consumers *not to patronize company B* • • •. Under the new amendment, *such* picketing becomes illegal." 105 Daily Cong. Rec. A8523 (Oct. 2, 1959), 2 Leg. Hist. 1857. (Emphasis supplied.) This treatment parallels the definition of a "secondary consumer boycott" which the Senator had previously supplied his colleagues.[21] And it confirms our view that the intent of the amendment's advocates was to deal with consumer picketing aimed at cutting off the business of secondary employers, not consumer picketing aimed at cutting off the sales of primary products.

In the House deliberations on the Conference Report, a similar distinction can be found between publicity picketing whose target is the "nonunion goods," and picketing whose target is the "wholesaler or retailer" selling such goods. Thus, Representative Thompson, a member of the Conference Committee, and Representatives Macdonald and Pucinski all cited the following analysis: "Consumer appeals:

[21] See p. 22, *supra.*

The right to publicize *nonunion goods* to consumers, without causing a secondary work stoppage, is recognized in the conference agreement. Employees will *also* be entitled to publicize, *without picketing, the fact that a wholesaler or retailer sells goods* of a company involved in a labor dispute." 105 Daily Cong. Rec. 16635 (Sept. 4, 1959), *id.* at A7855 (Sept. 8, 1959) *id.* at A8262 (Sept. 14, 1959), 2 Leg. Hist. 1720, 1810, 1820. (Emphasis supplied.)

Senator Goldwater submitted to the Senate, and Representative Griffin submitted to the House, the same "summary analysis" of the conference agreement. The Landrum-Griffin bill, this said, "[p]rohibits secondary customer picketing at retail store which happens to sell product produced by manufacturer with whom union has dispute." 105 Daily Cong. Rec. 16539 (Sept. 3, 1959) *id.* at 17181 (Sept. 9, 1959), 2 Leg. Hist. 1712, 1454. As previously indicated, what Senator Goldwater meant by "secondary customer picketing" was picketing to induce customers "not to patronize" the retailer handling unfair goods.[22]

The only explicit suggestions anywhere in the long legislative history that any of the bills introduced in the Senate or House, or the final conference agreement, may have encompassed consumer picketing aimed solely at nonunion products, consist of a few isolated remarks from opponents of the proposals, who are notoriously unreliable gauges of the legislative intent. Thus, Senator Humphrey said he "fear[ed]" such consumer picketing "may also be the target of the words 'coerce, or restrain.'" 105 Daily Cong. Rec. 5580 (Apr. 17, 1959), 2 Leg. Hist. 1037 (discussing Goldwater amendment rejected by Senate). Representative Thompson presented an analysis that under the Landrum-Griffin bill, a union picketing against a struck product

[22] See text at note 21, *supra*.

"*apparently* could be enjoined upon the ground that it was 'coercing' or 'restraining' the retailer." 105 Daily Cong. Rec. 15222 (Aug. 20, 1959), 2 Leg. Hist. 1708 (branding this "a basic infringement upon freedom of expression"). (Emphasis supplied.) And the only unequivocal declaration we have been able to find that the ultimate Conference Report applied to consumer picketing of an unfair product comes from Senator Morse, who was expounding his reasons for dissenting from the Report. See 105 Daily Cong. Rec. 16397 (Sept. 3, 1959), 2 Leg. Hist. 1426.[23]

All the while, however, the sponsors of the legislation were refusing to say any such thing. Not only did Representative Griffin decline a thrice-proffered invitation to declare that all consumer picketing at a secondary establishment was banned by his bill;[24] he warmly endorsed and inserted into the Congressional Record an address wherein Representative Kearns, subsequently another member of the Conference Committee, had stated flatly: "Not all picket lines and boycotts are coercive." 105 Daily Cong. Rec. A3933 (May 11, 1959), 2 Leg. Hist. 1746. And whenever Senator Goldwater, probably the Senate's leading exponent of restrictive labor legislation, was explicit about what kind of secondary activity he wanted proscribed, his formula was phrased in terms of a refusal to patronize the secondary retailer, not in terms of a refusal to purchase the primary product. In interpreting the statute, heaviest

[23] But even vigorous critics of the Landrum-Griffin bill can be found among those recognizing that its target was boycotts of secondary retailers, not boycotts of primary products. See, *e.g.*, 105 Daily Cong. Rec. 14517 (Aug. 13, 1959), 2 Leg. Hist. 1689 (Rep. O'Hara: "It would make unlawful appeals to consumers asking them *not to patronize the retail outlets* of producers operating with strikebreakers"). (Emphasis supplied.)

[24] See p. 20, *supra*. Awareness of the constitutional right of free speech was one of the specific reasons for Rep. Griffin's caution. *Ibid.*

weight should obviously be accorded the views of its sponsors and advocates, not the views of its opponents and detractors.

The pickets in the present case expressly disavowed any dispute with Safeway, the retailer (R. 31, 32). Safeway was not shown to have been injured in any way, and it lodged no complaints (R. 60, 63, 66). Customers were only asked to refrain from purchasing Tree Fruits' nonunion apples, not to stop patronizing Safeway (R. 38). The picketing took place at the most logical site; customers buy apples at retail stores, not at packing houses. Every item of evidence confirms this was picketing of a primary employer's product, not picketing of a secondary employer's business. Congress did not, and constitutionally could not, outlaw such peaceful publicity picketing.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the brief for respondents, the judgment of the court below should be affirmed.

Respectfully submitted,

J. Albert Woll
General Counsel, AFL-CIO
Robert C. Mayer
Theodore J. St. Antoine
736 Bowen Building
815 Fifteenth Street, N.W.
Washington 5, D. C.

Thomas E. Harris
Associate General Counsel,
AFL-CIO
815 Sixteenth Street, N.W.
Washington 6, D. C.

November 1963